

IN THE MATTER OF the Ontario Human Rights Code, 1981, S.O. 1981, c.53, as amended (now R.S.O. 1990, c.H-19);

AND IN THE MATTER OF the Complaint of Darla-Jean Humphreys (Wotherspoon) dated April 4, 1988, alleging discrimination in employment on the basis of marital status, sex, and family status by 582945 Ontario Ltd. and Dave Kazdan;

AND IN THE MATTER OF the Complaint of Michael Rigby dated June 13, 1988, alleging discrimination in employment on the basis of reprisal by Dave Kazdan.

BEFORE:

Elizabeth Beckett

APPEARANCES:

Catherine Bickley	Counsel for the Ontario Human Rights Commission
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Alan Mostyn	Counsel for 582954 Ontario Ltd. and Dave Kazdan
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Darla-Jean Humphreys (Wotherspoon)	on her own behalf
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Michael Rigby	on his own behalf
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On October 7, 1992 I was appointed by the Honourable Elaine Ziemba, Minister of Citizenship, as Chair to this Board of Inquiry to decide the issues presented by the parties to this dispute. Hearing dates of April 29, 30, 1993, May 3 and 4, 1993 were set and a further date of May 28, was added to hear legal argument.

PRELIMINARY ISSUES

DELAY

Counsel for the defence has raised the issue of delay. An agreed upon chronology of event was conveniently set out by counsel for the defendants. Darla-Jean Humphreys and Michael Rigby were fired by Mr. Kazdan on January 28, 1988 and as a result of that action, on April 18th and June 3rd, 1988 respectively, they filed a complaint with the Ontario Human Rights Commission alleging a violation of the Human Rights Code. The complaint was served on the respondents on August 5th and 8th, 1988 and the respondent returned the questionnaire attached to the complaint on August 24th, 1988. In March 1991, the parties were informed that these complaints had been assigned to the Special Task Force that had been set up to deal with a backlog of outstanding complaints. On July 22, 1992, Professor Berend Hovius was appointed to hear and decide these matters but later advised the parties that he would find it necessary to resign this

appointment and as noted above I was appointed on October 7, 1992. In summary, the passage of time from the filing of the complaint to the appointment of the current Board was about four and one half years.

Mr. Mostyn argued that this delay was particularly prejudicial to his client as Mr. Kazdan is 81 years old and his hearing and memory have deteriorated over the past five years. Mr. Kazdan and his wife have found the process of defending the complaint and the preparation for the hearing to very stressful. They are immigrants to Canada and holocaust survivors and the suggestion that they have been involved in wrongdoing is particularly upsetting.

Mr. Mostyn further argued that the disclosure by the Human Rights Commission was inadequate as he was not given access to the investigator or the full file in possession of the complainants. He pointed out that the movement in both criminal and civil courts was for full and complete disclosure/discovery. Mr. Mostyn relied on Kodellas v. Saskatchewan Human Rights Commission, [1989] 5 W.W.R. 1 {Sask. C.A.}; Motorways Direct Transport Ltd. v. Canada, (1991), 36 C.C.E.L. 201 {Fed. Ct.} and Shreve v. Corporation of the City of Windsor (unreported Ontario Bd. of Inquiry, March 1993) to support his application that the matter be dismissed at this stage.

Ms. Bickley on behalf of the Commission argued that this matter had been handled, until recently, by Mr. Ross who is the son-in-law of the defendants and a lawyer. She argued that the answer to the complaints contained in the questionnaire returned

by the defendants was made in August 1988. It was a detailed document and could be used to refresh the memory of the defendant. Further the defendant would seek to use in his testimony a diary that was purported to have been made contemporaneous to the events in question. It was acknowledged that these events and their consequences were upsetting and frustrating to all involved but this is not a reason to dismiss the complaints. She pointed out that all witnesses were available and the memory problem did not constitute an insurmountable barrier to proceed particularly as there were documents that could be relied on. Ms. Bickley relied on a number of cases most relevant being Ghosh v. Domglass Canada Ltd., (1991), 16 C.H.R.R.D/16 Nisbett v. Manitoba Human Rights Commission, (Unreported, <arch 30,1993, Man. C.A.) and Guthro v. Westinghouse Canada Inc., 15 C.H.R.R., D/388.

It now seems absolutely clear that Kodellas is not good law in Ontario. It has been distinguished and not applied in many Board of Inquiry rulings. The Motorways decision of the Federal Court Trial Division relied on Kodellas and is therefore tainted but more importantly it dealt with a situation where the Court found that the delay had caused "severe prejudice". In the Motorways case, the motion to dismiss was brought while the investigative process was still in progress. Four years had passed and still no inquiry was scheduled. The Court noted:

"While Hinnchsen's dismissal did not take place until December 1984 there was an extremely long series of complaints going back to 1963. He was supervised by eight

different terminal managers, one of whom is now dead and the only one the company was able to communicate with ... has not been employed by Motorways for six or seven years." p.D/463

In considering delay, Ontario boards of inquiries have applied the criteria set out in Hyman v. Southam Printing Ltd., (1981), 3 C.H.R.R. D/617 (Ont. Bd.Inq.):54 cited with approval in Ghosh v. Domglass Inc. C.H.R.R. 16, 1992:

"... while unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy ... or in weighing the persuasive force or credibility of testimony or evidence, delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings unless the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned, by an order of the Minister, a statutorily defined task of undertaking an inquiry ... the board should attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made the task impossible."

The Board in the Shreve case decided that delay along with other factors had created an abuse of process. In that case, not only had there been a delay of six years, there was also evidence of bias in the report of the investigating officer to the Commission. These two facts, together with a lack of disclosure, led to the decision to dismiss the complaints without a hearing on the merits. Professor Kerr states in his reasons that "to justify dismissal, delay must result in serious prejudice to the ability of the Respondent to present its case." (page 16) In the present case no serious prejudice has been demonstrated.

In this case there has been considerable passage of time but

the witnesses are all available, there are documents available to help refresh memories and therefore the task of this Board is possible.

PROCEDURAL UNFAIRNESS

Mr. Mostyn raised the issue of procedural unfairness regarding what, he argued, was inadequate disclosure. This matter was dealt with at the hearing held to determine this case and is noted here merely to create a complete record. The disclosure in this matter was as full as is required by the statute that governs these proceedings: The Statutory Powers and Procedures Act R.S.O. 1990, C.s.22, section 8. This section requires that "reasonable information of any allegation" be given to the party against which the allegations have been made. This information was given to the respondents. To order greater disclosure would infringe on the established practices that protect the privilege enjoyed by counsel in preparing their cases.

Mr. Mostyn noted that although the Commission must give reasons for denying a hearing it is not required to give reasons why a hearing is ordered even when the investigating Officer has recommended that no hearing be held. It is sufficient to say that the actions of the Commission in carrying out its statutory duty are not within the jurisdiction of this Board to criticize particularly when the Commission did not contravene the statute. Once a hearing has been ordered the reasons behind that decision

are totally irrelevant to this Board. My task is to determine, based on the evidence presented at this hearing, whether or not the Human Rights Code has been contravened and to fashion a remedy if it has.

DECISION ON THE MERITS

The two complaints that initiated this hearing revolve around a broiler chicken operation owned by the defendant numbered corporation of which Dave Kazdan is the president and majority shareholder. Mr. Kazdan is the directing mind of the corporation and any liability found to arise from his actions will, by the operation section 46 Ontario Human Rights Code, (R.S.O. 1990 c H.19) also rests with the corporation.

The corporation mentioned above owns a number of chicken operations but only one has direct relevance to this hearing. The day to day management of the operations at the time of the events in question was the responsibility of Michael Rigby. Mr. Rigby was educated at Guelph University and was hired by Mr. Kazdan in 1979 as a farm operator lead hand on a farm with the capacity for 16,000 birds. In addition to his own operation he supervised four other farms. In 1979, Mr. Kazdan's son Jack was the overall manager. As Jack Kazdan became more involved with other business concerns, Mr. Rigby's responsibilities increased. By 1987 he was General Manager handling all financial matters except negotiating contracts and supervising seven barns on two locations.

In July of 1987, Rigby hired Mr. Wotherspoon to manage one of the farm operations. Mr. Wotherspoon moved onto the farm in mid August with Darla-Jean Humphreys and their two children then aged 4 and 6 years. It was a common practice on Mr. Kazdan's farms that a couple would work the farm together, sometimes the pay would actually be issued in two separate cheques reflecting the shared responsibility. Mr. Wotherspoon hated the work and one day in the early fall he quit without notice. Darla-Jean Humphreys, on the other hand, quite enjoyed the work and approached Mr. Rigby and asked for the job. The arrangement was made and Ms. Humphreys quit her job at the local land fill site and commenced full time work on the farm.

There was a dispute in the evidence as to whether Mr. Rigby had the authority to hire. Mr. Rigby's evidence was that he did but Mr. Kazdan's evidence was that although Mr. Rigby did the initial screening etc., ultimately the decision rested with himself. In any event Ms. Humphreys did take over the farm management job in early September 1989 either because Mr. Rigby hired her or because Mr. Kazadan acquiesced to Mr. Rigby's recommendation to hire her. Mr. Kazdan did expressed concern to Mr. Rigby at the time Ms. Humphreys was hired about whether she could handle the operation as well as her family responsibilities. This was the first time there had ever been a woman hired a sole farm manager although as stated above there had often been women working on the farms. Mr. Kazdan never expressed any concern to Ms. Humphreys directly.

Ms. Humphreys was in charge of three large barns and one

small one with a total capacity of 75,000 birds. The production cycle from receiving the chicks to sending out the full weight birds was 6-8 weeks. The barns had to be checked periodically during the day; water and feed systems kept in good working order; shavings (used for bird bedding) kept dry at all times and dead birds disposed of. Generally the farm manager is responsible for the health and maintenance of the birds. The pay was \$1330 per month plus accommodation. There were some bonuses given if the birds weighed in well but the farm managers were not informed of the criteria for the bonuses nor were they given information about the weights of the birds that they raised.

From Ms. Humphreys' point of view the job was ideal. She had always worked and now she had a job that allowed her to work at her home location. She could supervise her children and at the same time provide her family with living accommodation and an income; in addition she testified that she really enjoyed the job.

Mr. Rigby testified that it took about six months to fully train a farm manager and therefore during Ms. Humphreys employment, which, as it turns out, only lasted five months, he worked quite closely with her. He testified that he found her to be an enthusiastic, hard working individual. He had no complaints about her performance.

Mr. Kazdan was not so pleased. He testified that he found wet shavings in her barns and that once chickens shipped from her barn were shipped under weight. There was no evidence of what the appropriate or complained of weights actually were. One

presumes that such information is available in such a sophisticated industry as broiler production in Ontario has come to be. Although Mr. Rigby did not deny there was a shipment of low weight birds, he testified that this was due to a chicken disease that was spreading in the area. It was decided to ship the birds on the Kazdan farms early to avoid having that crop destroyed by the disease. Apparently Mr. Kazdan was not part of that decision as he denied all knowledge of it.

Ms. Humphreys remembers disease in the area but was not aware of the weight of the birds shipped as she was never given this information about any shipment. The testimony of the other farm manager, Mr. Linton supported the testimony of disease on a farm in the area.

Mr. Kazdan never communicated his concerns to Ms. Humphreys directly but rather complained to Mr. Rigby who was expected to deal with them. Besides the concerns Mr. Kazdan had about the conditions of the barns, he mentioned several other issues. Ms. Humphreys had three dogs on the premises. Under normal circumstances the presence of dogs on a farm is encouraged and indeed Mr. Rigby allowed his farm managers to have dogs. Ms. Humphreys' dogs were a problem because Mr. Kazdan was afraid of them. Ms. Humphreys owned a pit bull terrier; a doberman and a great dane/labrador crossbred. Although there was no evidence that the dogs actually attacked anyone, these are particularly aggressive breeds by reputation. The testimony was that suppliers were reluctant to come on the property when they saw the sign that informed people of the dogs presence and so the

sign was removed. The dogs stayed but were chained up. Mr. Kazdan testified that they barked at him and he was nervous getting out of his car to enter his office which was located on the same property as Ms. Humphreys' farm. When he complained to Michael Rigby, Mr. Rigby refused to speak to Ms. Humphreys about this issue as it was Mr. Rigby's contention that all farm managers were allowed to have dogs. Mr. Kazdan did not speak to her about this matter.

Soon after moving to the farm, Ms. Humphreys got two horses. Mr. Kazdan testified that she spent too much time with the horses; that she used shavings intended for the chickens as bedding for the horses and that she used lumber that belonged to him to build stalls for the horses. Ms. Humphreys denied the first two allegations but did say the stall was built with lumber found "laying around" the farm. She knew nothing of Mr. Kazdan's concerns until the day she was fired. When Mr. Kazdan raised these concerns with Mr. Rigby, he was informed that farm managers were allowed to have horses as Mr. Rigby felt that it gave them a reason to stay on the premises and therefore in the long run benefited the operations. Mr. Rigby never mentioned Mr. Kazdan's concerns to Ms. Humphreys. Mr. Linton, the other farm manager, also had horses. He too testified that he purchased his own bedding.

Mr. Kazdan testified that he was annoyed because Mr. Wotherspoon, who continued to live on the property with Ms. Humphreys, was operating a welding machine in a small shed on the premises using electricity from the house. Mr. Kazdan seemed

less concern with the cost of the electricity than the possibility of fire. Again, Ms. Humphreys did not know of this problem but she testified that had the issue been raised with her, by Mr. Kazdan, she could have reassured him that the power source required for this machine was not available on the farm; that machine was a present for Mr. Wotherspoon for Christmas; that it was to be used at his father's shop and that it was never out of its box from the time she purchased it to the time it was removed from the property.

There was testimony of acrimonious relations between Mr. Linton and Ms. Humphreys but they have nothing to do with the actual events at hand. They were not raised by the defendants as a reason for firing the complainant and the testimony from the Lintons regarding the horses kept by Ms. Humphreys was distinctly lacking in credibility. There was testimony by Mrs. Linton about the condition of Ms. Humphreys' house, horse, and horse's stall. This evidence was lacking in both relevance and credibility.

Ms. Humphreys testified that she felt Mr. Kazdan was around alot more while she was employed compared to the weeks when her husband held the job. She said that sometimes he would go into a barn before she had done her work and then criticize her because the bedding was wet or the feeders not maintained. However, in general, although Mr. Kazdan spent many days a week at the farms, he had little contact with Mr. Linton or Ms. Humphreys, preferring instead to leave the task of communicating to the

employees to Mr. Rigby. This is a task Mr. Rigby carried out only as he saw fit, not as his employer requested. It therefore came as a total shock to Ms. Humphreys when, on January 28 1989, she was informed by Mr. Kazdan that she was fired.

The evidence was that Mr. Kazdan asked Mr. Rigby to fire Ms. Humphreys and when Mr. Rigby refused, he did it himself. Ms. Humphreys attempted to defend herself. She said she would get rid of the dogs and that the welding machine was a gift but the dye was cast by this point. Mr. Kazdan had made up his mind.

Mr. Kazdan never told Ms. Humphreys that he was firing her because she was a woman or because she had family responsibilities. In fact the firing was quite summarily carried out with few reasons given and no chance for discussion. It was Mr. Rigby who told Ms. Humphreys that she was fired because she was a woman and because she had a family and further that Mr. Kazdan had been reluctant to hire her for these same reasons. Mr. Rigby told her he had protested vigorously in her defence and because of this he too was fired.

Because the job included accommodations, Ms. Hymphreys had to find a new place for her family to live and give away her dogs. The horses were already sold at this point. She moved off the farm the third week in February 1989.

Mr. Rigby similarly had to move but he did not accomplish this until the end of June. Neither party paid any rent to Mr. Kazdan.

At all times I found Ms. Humphreys to be a credible witness who gave her testimony in a truthful and straightforward manner. Because of the way in which this farm operation was run, she never had the opportunity to either know what her employer's concerns were or to deal with them. The very poor communication chain allowed Mr. Rigby a great deal of autonomy that was never properly supervised by Mr. Kazdan. It had exceedingly bad results for Ms. Humphreys. Mr. Rigby's paternalistic protection of Ms. Humphreys from the criticism of Mr. Kazdan deprived her of the opportunity to deal with her employer's concern in a way she saw fit; rather she never knew what they were and this, in the end, had very unfortunate consequences for her.

During the hearing Mr. Kazdan sought to refresh his memory from notes he said he made at the time of the events. These notes were made in Yiddish and kept in a small diary. A translation was prepared for the Board. These notes lacked any credibility as a record of what they were said to be. The respondent's testimony in relation to these notes was such that the Board was unable to believe that they were made in the manner the respondent testified they were. The Board therefor disregards this evidence in its entirety.

Mr. Kazdan denies that the firing arose due to anything other than the considerable complaints he had concerning the complainant about which nothing was done despite his best efforts to affect a change. Mr. Rigby says the firings were not due to any complaints that Mr. Kazdan had as similar complaints against

other managers had not led to firings; rather he says Mr. Kazdan resented having a woman running the farm and looked for excuses to fire her. Ms. Humphreys could shed little real light on this as she was never told by either Mr. Kazdan or Mr. Rigby what was going on until after the event.

Mr. Kazdan testified that on the day he fired Ms. Humphreys, Mr. Rigby was very upset and called him "a dirty crazy Jew", and this was the reason he was fired.

There was evidence given by a Mr. Kocis who employed Mr. Rigby for a short time after he left Mr. Kazdan's. Mr. Kocsis is a lawyer who has a sole practitioner practice in the city of St. Catharines. He also has chicken quota and operates two farms with a total potential for 50,000 to 60,000 birds. He said that although Mr. Rigby started with a good attitude, it soon became apparent that he did not take direction well and did not run the operation as Mr. Kocsis directed. His impression of Mr. Rigby was that he was a very intelligent man with lots of knowledge but with an attitude problem.

Eventually, a Ms. Huisman was hired to take over the farm Ms. Humphreys left. She was hired after the complaint was filed to replace the farm manager hired directly after Ms. Humphries. She was hired by while Jack Kazdan was running the operation. She worked the farm on her own, living on the farm with her son. When the Lintons left their farm she took over that operation as well at no increase in pay. She never received any bonuses. During her tenure, Mr. Kazdan came to the farm once every week or

every other week to spend the day. She worked for the defendant for just less than 2 1/2 years.

The question before this Board is not whether these employees were treated fairly by Mr. Kazdan; not whether they were fired properly and not whether they did their respective jobs well. Clearly there are many faults that could be pointed to on each side of the fence. Rather this Board must decide whether the provisions of the Human Rights Code of Ontario were violated. Was Ms. Humphreys fired because she was a woman with a family and was Mr. Rigby fired because he attempted to uphold the Human Rights Code in the face of its violation?

It is clear that when an employer terminates an employee the grounds for terminations may be many and various. To be in violation of the Code it is not required that Commission prove that discrimination was the only ground for the termination but rather that it be a basis for the employers actions. (See Holden v. Canadian National Railway (1990) 14 C.H.R.R.D/12) An early case Horton v. Niagara (Regional Municipality) 1987, 9C.H.R.R. D/4611 stated:

"It is accepted in human rights jurisprudence that even if a breach of the Code is only one among other causes leading to the action in question, then the entire action is tainted."

There is even the suggestion that the prohibited ground may have played a part even only subconsciously. This Board however is conscious that there must be some proof that the prohibited

ground did play a part. It is not enough to simply place the complainant in a prohibited category and then allege discrimination when an action takes place that has a negative impact on the complainant.

It was suggested that what is at question here is an issue of credibility. Mr. Rigby stated that Mr. Kazdan was leery from the beginning about Ms. Humphreys' ability to carry out the job because of her family responsibilities. Is being concerned about a person's ability a violation of the Code? Surely Mr. Kazdan could voice his concern to his manager. He was hiring a woman to be a farm manager who had the added responsibility of a family. In the past, women in that position only helped someone else to do the task; in the past Mr. Kazdan often got two employees for the price of one or at least one and a half employees for the price of one. It seems natural that he would raise the question "Is she capable of carrying out this ambitious project?" He had the right (at least in his own mind) to say "no". He did not. He allowed her to be hired or hired her, depending on what evidence is accepted. It would be reading alot into the law of Ontario to suggest a citizen cannot have real worries about things with which they are unfamiliar. The Code is not violated unless a person lets these concerns govern their actions resulting in unequal treatment to the point of not hiring a particular employee. Once the employee is hired the Code requires that treatment of the employee not be motivated by any of the prohibited grounds.

There was evidence lead that Mr. Kazdan spent more than the

usual time at the farm once Ms. Humphreys was hired compared to when Mr. Wotherspoon was employed as farm manager. This, it was suggested, was because he was suspicious of Ms. Humphreys ability and was over supervising her, looking for an excuse to fire her. Mr. Wotherspoon's employment, however, coincided with Jewish High Holidays when Mr. Kazdan was attending to his spiritual life. Ms. Humphreys own evidence was that, although occasionally Mr. Kazdan would mention something to her, in fact they had very little interaction. On the other hand, Mr. Kazdan had several concerns that he raised on a number of times with Mr. Rigby. Mr. Rigby did not pass these on to Ms. Humphreys. Her behaviour did not change; this was not her fault but the result was that Mr. Kazdan saw no change.

Given all the evidence it is the finding of this Board that it has not been proven that Mr. Kazdan fired Ms. Humphreys because of a prohibited ground nor that Mr. Rigby was fired in retaliation. There is no evidence to suggest that once Ms. Humphreys was hired her sex or family status were of concern to Mr. Kazdan. Mr. Rigby testified it was of concern when she was hired but he not testify that it was raised by Mr. Kazdan once Ms. Humphreys was doing the job although other issues were certainly raised. Mr. Rigby formed the opinion that Mr. Kazdan was picking on Ms. Humphreys and so he did not pass on information to Ms. Humphreys. It was Mr. Rigby's conclusion that Mr. Kazdan was targeting Ms. Humphreys' work in order to have an excuse to get rid of her. The Board does not find, based on the evidence that

this claim is supported.

Based on these findings the complaints of Darla Jean Humphreys and Micheal Rigby against Dave Kazdan and 582945 Ontario Limited are dismissed.

September 21 , 1993

Elizabeth Beckett